

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1304

**JAMES B. BRADLEY, JR., BRYON H. JOHNSON,
ROBERT T. ODELL, JR., AND WILLIAM JAMES
HELLIESEN, PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the District of Massachusetts, petitioners were found guilty on May 6, 1971, of conspiring to violate 26 U.S.C. (1964 ed.) 4705(a) by selling a narcotic (cocaine) without a written order form, in violation of 26 U.S.C. (1964 ed.) 7237(b).¹ On June

¹ Petitioners Bradley, Odell, and Helliesen were also convicted of carrying a firearm during the commission of a felony, in violation of 18 U.S.C. (1964 ed.) 924(c) (2).

2, 1971, each petitioner was sentenced to a five-year term of imprisonment on the conspiracy conviction under 26 U.S.C. (1964 ed.) 7237(b).^{*} The court of appeals affirmed (Pet. App. B).

Thereafter, relying on *United States v. Stephens*, 449 F. 2d 103 (C.A. 9), petitioners moved in the court of appeals for vacation of their sentences and for remand of the cause to the district court for resentencing (Pet. App. D). Petitioners contended that although 26 U.S.C. (1964 ed.) 7237(d) rendered suspended sentences, probation and parole unavailable in convictions for narcotics violations prior to May 1, 1971, the repeal of Section 7237(d) on May 1, 1971, in the Comprehensive Drug Abuse Prevention and Control Act of 1970^{*} required the trial judge, in sentencing petitioners on June 2, 1971, to take into account the sentencing alternatives (suspension of sentence, probation, and parole availability) permissible under the new Act.

The court of appeals, treating the motion as an "appendage" to the original appeal, denied the requested relief (Pet. App. A). Explicitly rejecting the reasoning and result in *Stephens, supra*, the court held that, by virtue of the general federal savings statute (1 U.S.C. 109) and the specific savings clause of the new Act (Section 1103(a), 84 Stat. 1294), Section 7237(d) remained in force with respect to

^{*} In addition, petitioners Bradley, Odell and Helliesen received one-year suspended sentences on the firearms conviction with probation for three years to commence after the prison terms.

^{*} 84 Stat. 1242, 21 U.S.C. 801-966.

violations occurring prior to May 1, 1971, regardless of the date of sentencing.

As we have previously discussed in other briefs, we perceive no conflict between *Stephens* and those cases upholding the imposition of the five-year minimum mandatory term upon persons sentenced after May 1, 1971. See, e.g., the government's briefs in opposition in *Fiotto v. United States*, No. 71-1114, O.T., 1971, certiorari denied, May 15, 1972; *Wollack v. United States*, No. 71-992, O.T., 1971; *Wooden v. United States*, No. 71-6085, O.T., 1971. The decision of the court below, however, is in direct conflict with the decision in *Stephens* with respect to the availability of suspended sentences and probation for persons sentenced after May 1, 1971, upon conviction for narcotics offenses occurring before that date.* We believe that the rationale supporting application of the earlier penalty provisions for offenses committed prior to the effective date of the 1970 Act also supports applying the Section 7237(d) bar against suspended sentence and probation in such cases, and that *Stephens* was therefore incorrectly decided.

Although there is a direct conflict about whether suspended sentence and probation are available, this issue is not, in itself, of continuing significance, as we noted in our brief in opposition in *Fiotto*, *supra*, at p. 6, n. 5. The 1970 Act applies to all offenses committed after its effective date of May 1, 1971, and the

* We are informed that none of the petitioners has a substantial criminal record so that probation, if available, is a realistic possibility in this case.

earlier statutes control where sentencing occurred prior to that date. Questions concerning the availability of those sentencing alternatives could arise, therefore, only in the cases that span the prior statutes and the 1970 Act.

However, the court below also decided that since Section 7237(d) applied, the district court could not consider fixing eligibility for parole at the time of sentencing (Pet. App. A, at pp. 12, 15). See 18 U.S.C. 4208. In view of the fact that Section 7237(d) bars parole as well as suspended sentences and probation, the court's decision in *Stephens*, distinguishing between sentence as such and probation,⁶ also draws into question the availability of parole and strongly suggests a result contrary to that reached by the court of appeals in this case.⁷ The question whether parole can be granted is not limited to those persons sentenced after May 1, 1971, but comprehends all persons in custody who, regardless of the date of sentencing, were convicted of violating the old narcotic laws, which did not permit parole.⁷ Thus, the inconsis-

⁶ See also *United States v. Fithian*, 452 F. 2d 505 (C.A. 9).

⁷ See, e.g., *Batista v. United States*, No. 6301-Crim., C.D. Cal., decided April 21, 1972, modifying on the basis of *Stephens* a sentence imposed on October 29, 1970, under the old narcotics laws, by adding the following:

"IT IS FURTHER ADJUDGED that the defendant shall become eligible for parole under Title 18, United States Code, § 4208(a)(2), at such time as the Board of Parole may determine."

⁸ See note 6 *supra*.

tency between the decision below and the implications of *Stephens*, if not resolved, could place the Board of Parole in the untenable position of having to apply one rule regarding the availability of parole for prisoners previously convicted of narcotics offenses in the Ninth Circuit and another rule for prisoners convicted under the old narcotics laws in other circuits.* We therefore would not oppose the granting of the petition for a writ of certiorari in this case.*

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

* If, as the court below held, Section 7237(d) bars parole eligibility for those persons sentenced after May 1, 1971, we think it necessarily follows that prisoners already convicted and sentenced before that date did not become eligible for parole when Section 7237(d) was repealed. On the other hand, it may not follow from *Stephens* that all persons now in custody for violating the narcotics laws, as distinguished from those persons sentenced after May 1, 1971, became eligible for parole after that date, although the district court in *Batista, supra*, so held.

* In taking this position we have considered the alternative of waiting to seek or support review of a decision more directly presenting the issue that, in our view, does have continuing significance: whether prisoners sentenced and convicted under the old narcotic laws are now eligible for parole because Section 7237(d) has been repealed. The difficulty with this is that in the interim, which may be a significant length of time, the Board of Parole may be compelled to follow a different rule for persons convicted in the Ninth Circuit than it follows for persons convicted elsewhere.